from failure to remember the distinction than from the facts of the case. The facts are simple enough.

In this connection we would refer to the views expressed by the House of Lords in *Connelly* v. *Director of Public Prosecutions.*[12] The facts of that case are that, arising out of an armed robbery, two indictments were preferred against the appellant, the first charging him with murder and the second charging him with robbery. Because of the rule of practice enunciated in *R.* v. *Jones*[13] it was not permissible to include both charges in one indictment and the two indictments could not be tried together. At the trial of the first indictment for murder the appellant was found guilty but, the conviction was set aside by the Court of Criminal Appeal on the ground of misdirection.

The court subsequently gave leave to proceed with the second indictment. When that indictment came on for trial the trial judge directed the jury to reject a plea of *autrefois acquit* but indicated that, if he had a discretion, he would have stayed the second indictment on the ground that it involved a retrial of the issue of identity decided in the appellant's favour on the first indictment. The trial later proceeded before a different judge who also rejected a plea of *autrefois acquit.* Appellant was convicted and his appeal finally came before the House of Lords which dismissed the appeal.

Lord Reid (after referring to the practice based on *R.* v. *Jones, supra*) stated:—

"I think the present practice is inconvenient and ought to be changed. I realise that there are cases where for one reason or another it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all charges which he intends to prefer; but in a case where it would have been improper to combine the charges in that way, or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general question as to the extent of the discretion of the court to prevent a trial from taking place; but I think that there must always be a residual discretion to prevent anything which savours of abuse of process."

Lord Morris of Borth-y-Gest at page 409 has this to say:—

"It is however, clear that in framing two indictments against the appellant in the present case, the prosecution were not at fault and were only doing what they were obliged to do. While as I will endeavour to show, there has never been a rule that some facts may not form a basis of successive charges, there is inherent in our criminal administration policy and tradition that even in a case of wrongdoers there must be an avoidance of anything that savours of oppression."

I now quote the headnote:—

"The court has discretion (outside the strict limits of a plea of *autrefois* acquit or *autrefois* convict) to stay, and in general should stay, a subsequent indictment containing charges founded on the same facts as those on which a previous indictment is based on one incident. The general rule, accordingly must be that charges which may be joined in an indictment in accordance with r. 3 of Schedule 1 to the Indictments Act, 1915 should be so joined, but the court retains a discretion in special circumstances not to apply the general rule thus ensuring that there is no abuse of its process; the exceptional rule of practice, whereby no other count should be joined in an indictment with a count for murder or manslaughter (see *R.* v. *Jones* [1918] 1 K.B. 416 and *R.* v. *Large* [1939] 1 All E.R. 753) should no longer have effect as a rigid rule to be applied irrespective of prejudice or embarrassment to the defence, the defendant being able to apply for separate trials if he so wishes."

It is clear from this judgment of the House of Lords that in considering whether to allow joinder or not, the paramount consideration would be that any order whether allowing or refusing a joinder should only be made after consideration of whether such order would prejudice or embarrass the defence.

In our judgment the defence in the case under reference was never in the least prejudiced. We therefore answer the second question also in the affirmative.

Questions answered in the affirmative.

Solicitors: *Shearn, Delamore & Co.*

SIAH IK KOW v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye C.J. (Malaya), Gill F.J. and Pawan Ahmad J.) January 27, 1969]

[Ipoh — Federal Court Reference No. X4 of 1968]

Road Traffic — Goods carried for the purpose of trade or business — Presumption — Whether available — Road Traffic Ordinance, 1958, ss. 74(1), 98(1) and 144(a).

Evidence — Fact discovered in consequence of information — Evidence Ordinance, 1950, s. 27 — Criminal Procedure Code (Cap. 6), s. 113(i).

The applicant was convicted on two charges of offences under sections 74(1) and 98(1) of the Road Traffic Ordinance, 1958. It was alleged that he was carrying goods for the purpose of trade or business without a haulage permit and that the use of the vehicle for such purpose was not covered by third-party insurance. At the trial evidence was admitted of a statement by the applicant to one of the police constables who stopped him that the cucumber which was carried by him in the car weighed 90 katties. The appeal of the applicant against his conviction was dismissed in the High Court but the following question of law was reserved for the decision of the Federal Court:— "Whether in a charge under section 98(1) of the Road Traffic Ordinance, 1958 having regard to the principles of law relating to the onus of proof resting upon the prosecution, the presumption contained in section 144(a) of the Road Traffic Ordinance, 1958, is available to the prosecution for establishing that the goods were carried for the purpose of trade or business and so as to raise a *prima facie* case against the person charged with an offence of that nature." Section 144(a) of the Ordinance provides that in any proceedings for an offence under Part V of the Ordinance in so far as it may be necessary to establish the offence charged it shall be presumed until the contrary is proved that any conveyance of persons or goods in a motor vehicle was for hire or reward.

Held, quashing the conviction: as the presumption under section 144(a) of the Road Traffic Ordinance relates specifically to goods conveyed for hire or reward, it cannot be used to raise a presumption that the goods were carried for the purpose of a trade or business.

Semble: the statement of the applicant as to the alleged weight of the cucumber was not admissible under section 27 of the Evidence Ordinance since it was not a fact discovered as a consequence of the information given by the applicant

FEDERAL COURT.

P.P. Dharmananda (*R.C.M. Rayan* with him) for the applicant.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye C.J.: The question of law reserved for the decision of this court by the judge at Ipoh under section 66 of the Courts of Judicature Act, 1964, is as follows:—

"Whether in a charge under section 98(1) of the Road Traffic Ordinance, 1958, having regard to the principles of law relating to the onus of proof resting upon the prosecution, the presumption contained in section 144(a) of the Road Traffic Ordinance, 1958, is available to the prosecution of establishing that the goods were carried for the purpose of trade or business and so as to raise a *prima facie* case against the person charged with an offence of that nature."

The presumption raised by section 144(a) reads:—

"144. In any proceedings for an offence under Part V of this Ordinance, in so far as it may be necessary to establish the offence charged, it shall be presumed until the contrary is proved —

(a) that any conveyance of persons or goods in a motor vehicle was for hire or reward;"

This reference is the sequel to dismissal of the applicant's appeal to the High Court at Ipoh against his conviction by the magistrate at Lumut on two charges of offences under sections 74(1) and 98(1) of the Road Traffic Ordinance, 1958. The prosecution was based on skeletal facts only: to quote the judge:—

"Two police constables at the Telok Muroh junction stopped a Mazda motor car No. AH 4645 coming from Telok Muroh. The appellant was driving the car and in the seat next to him were two children, one a girl, the other a boy. One of the police constables testified that he saw on the back seat of the car 9 bundles of cucumber weighing 90 katties. He informed the appellant that he had committed the offence of carrying goods for sale without a haulage permit. He also demanded for the driving licence. The third party insurance policy was not produced. The other police constable gave substantially the same evidence."

Upon the learned magistrate holding that there was a case to answer, the applicant, in his defence, gave evidence that he was that day on his way to a picnic with his two children and that what he carried in his car were only the makings of a picnic lunch, consisting of pineapples, bananas, noodles, aerated waters and cucumber, but nothing like 9 bundles or 90 katties of the vegetable as alleged.

The learned magistrate in his grounds of decision found that the applicant was going towards Kampong Koh where he "was a stallholder in Kampong Koh Market" and inferred therefrom that the load of cucumber was being carried there for sale. He accordingly convicted and fined the applicant $30 on each charge, disqualifying him also from driving.

The judge, quite rightly, pointed out that there was no evidence as to the applicant's place of residence nor that he was a market stallholder. But, then, he went on:—

"The question to be decided therefore is whether there was admissible evidence to support a *prima facie* case against the appellant. Two police officers had testified that they saw 9 bundles of cucumber on the back seat. Both said they weighed 90 katties. It would appear that they did not actually weigh the bundles and that the information of the weight of the cucumbers came from the appellant himself, as in answer to a question from the appellant one of the police constables said: *'Ia beri tahu saya mentimun itu 90 kati'*. In my view this evidence was admissible under section 27 of the Evidence Ordinance."

With the greatest respect, I do not think that section 27 can be legitimately put to such use. Neither the cucumber nor its alleged weight was a fact *"discovered"* in consequence of information given by the applicant. In truth the constables' evidence regarding the weight and quantity of cucumber (quantity being a corollary of weight) was inadmissible by reason of section 113(i) of the Criminal Procedure Code. Even the inroad made into that section by section 141(2) of the Road Traffic Ordinance (*q.v.*), being limited only to information of the nature specified in sub-section (1) of that section, does not go far enough to render the evidence admissible.

All this notwithstanding, the learned judge nevertheless was clearly of the opinion that "without the aid of the presumption, the prosecution in the case under appeal must fail". However, he saw no reason why, for the prosecution of an offence under Part V of the Ordinance, the presumption should not be raised. In the result, the convictions were upheld and the appeal dismissed.

We turn now to the question raised in this reference. With respect, we refer to the wording of the question itself and of the presumption quoted at the beginning of this judgment. In effect the answer sought by the question is: "when are goods carried to be held as carried *for the purpose of a trade or business*"? The presumption raised under paragraph (a) of section 144 relates to a horse of a different colour, namely, goods conveyed *"for hire or reward"*. The answer, therefore, must be in the negative. In the instant case, for example, assuming it was true that the applicant was carrying a considerable load of cucumber to the market for the purposes of his own trade or

business as a stall-holder, he was clearly not conveying the goods *"for hire or reward"*. The presumption, therefore, cannot be even remotely relevant.

In the result, we are of opinion that the applicant had been wrongly convicted on both charges. We accordingly quash the conviction and order that the fines be refunded. The disqualification is also annulled.

Conviction quashed.

Solicitors: *Dharmanada & Co.*

NEGARA TRADERS LTD. v. PESUROH JAYA IBU KOTA, KUALA LUMPUR

[O.C.J. (Raja Azlan Shah J.) February 5, 1969]
[K.L. — Civil Suit No. 972 of 1965]

Master and Servant — Liability of master — Forgery committed by servant — Scope of employment — No actual or ostensible authority.

The plaintiffs, without knowledge that local orders presented to them by the office messenger employed by the defendants were forgeries, sold and delivered certain goods to the defendants through the office messenger. The orders were forged by the office messenger and the defendants never received the goods. The forged orders were on the official forms of the defendants and were duly signed and stamped. The plaintiffs brought a claim for goods sold and delivered against the defendants on the principle of ostensible authority. It was proved that the defendants themselves were not at fault, that they had had no previous dealings with the plaintiffs and that it was not the duty of the office messenger to issue local orders.

Held: the office messenger did not have authority to guarantee the genuineness of the local orders which were forgeries. As the defendants did not hold him out to the plaintiffs as having authority to issue local orders and as it was not part of his duties to issue them, the defendants were not vicariously liable to the plaintiffs for the forgeries committed by the office messenger.

Cases referred to:—

(1) *Lloyd* v. *Grace Smith & Co.* [1912] A.C. 716.

(2) *Deatons Proprietary Ltd.* v. *Flew* (1949), 79 C.L.R. 370, 381.

(3) *George Whitechurch* v. *Cavanagh* [1902] A.C. 117.

(4) *Uxbridge Permanent Benefit Building Society* v. *Pickard* [1939] 2 All E.R. 344.

(5) *Sheriffa Shaikhah* v. *Ban Hoe Seng Co. Ltd.* [1963] M.L.J. 241.

(6) *Ruben* v. *Great Fingall Consolidated* [1906] A.C. 439.

(7) *Kreditbank Cassel* v. *Schenkers Ltd.* [1927] 1 K.B. 826.

(8) *South London Greyhound Race-courses Ltd.* v. *Wake* [1931] 1 Ch. 496.

(9) *Greenwood* v. *Martin's Bank Ltd.* [1933] A.C. 51.

CIVIL SUIT.

A.R. Rajasingam for the plaintiffs.

V.C. George for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is a claim for goods sold and delivered to the defendants (the Commissioner of the Federal Capital, Kuala Lumpur). The plaintiffs are a firm dealing in hardware. They allege that on eight separate occasions the defendants through their authorised agent or employee ordered and took delivery of changkols and scythe blades to a total value of $4,217.

The circumstances giving rise to the present claim are quite clear and undisputed. On 17th November, 1964, the manager of the plaintiff firm received a telephone call purportedly to be from the Municipal Health Department, Kuala Lumpur, asking for quotations for changkols and scythe blades. After being told of the prices, the caller, who spoke in Tamil, informed the manager that he would issue a local order and send it through a messenger. He further requested the manager to deliver the goods to the messenger. About one hour later Rajamanickam, the office messenger of the defendants' health department, arrived wearing the authorised uniform of the defendants and presented a local order to the plaintiffs' manager. The local order was, in point of form, genuine inasmuch as it was the local order form used by the defendants and was correctly entered and appeared to be signed by the head of the health department, Dr. L.S. Sodhy, with the official rubber stamp affixed to it. On the strength of it the manager prepared the delivery note, obtained Rajamanickam's signature, and handed him the goods. On the following day he sent the invoice to the health department. Seven similar orders were purportedly issued by the defendants. The same Rajamanickam presented those local orders to the plaintiffs' manager; he then took delivery of the goods after acknowledging receipt of them on the delivery advice notes. It is of interest to note that there were no dealings between the parties before 17th November, 1964.

It transpired that these orders were forgeries. The financial clerk whose principal duty was to prepare local orders denies preparing them. Dr. L.S. Sodhy denies ordering the goods or signing the local orders. I believe them. Their evidence was neither contradicted nor challenged. The invoices and the goods never reached the defendants. Nor were they aware of the transactions until 19th December, 1964, when the plaintiffs confronted them with a requested for payment. They immediately refuted liability and refused to pay. Departmental investigation revealed the forgeries. On 21st December, 1964, they lodged a report with the police. On the same day Rajamanickam gave 24 hours' written notice to resign and left without informing anyone. That letter was just left on a table. Until now he cannot be traced and there is a warrant of arrest awaiting him. The goods were never recovered.